No. 117.

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Supreme Court of the United States.

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OCTOBER TERM, 1900.

No. 117.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE CALL PUBLISHING COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR

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Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

THE CALL PUBLISHING COMPANY,
Defendant in Error.

Brief for Plaintiff in Error.

This case comes into this Court on a Writ of Error from the Supreme Court of Nebraska, to reverse a judgment of that Court affirming a judgment entered in the District Court of Lancaster County, Nebraska.

The case in which the judgment was entered was begun in the District Court of Lancaster County, Nebraska, by the defendant in error The Call Publishing Company, against the Western Union Telegraph Company, by the filing of a petition on the 29th day of April, 1891 (Record, p. 6).

The Petition.

The petition sets forth, as the ground of a recovery by the plaintiff, that since July 1, 1888, the plaintiff had been engaged in printing and publishing in the City of Lincoln, Nebraska, a daily newspaper styled

the "Lincoln Daily Call;" that, as such newspaper, it received from the Associated Press dispatches which were transmitted by the Associated Press from the City of Chicago, Ill., to the plaintiff over the telegraph lines of defendant; that the plaintiff had made an arrangement with the Associated Press for the privilege of receiving the dispatches daily, and had no other means of receiving the same, except over the lines of the defendant company; that the amount of these dispatches did not exceed 1,500 words per day, and that the defendant, the Western Union Telegraph Company, a common carrier and transmitter of news by telegraph, charged, demanded and collected of the plaintiff the sum of $75 each month for the transmission of these dispatches from Chicago to Lincoln for the plaintiff; that during all of said period the defendant unjustly and wrongfully discriminated against the plaintiff in that, while the defendant charged the plaintiff the sum of $75 each month for the transmission of dispatches aggregating not over 1,500 words per day, or at the rate of not less than $5 per hundred words, daily, per month, it only charged the State Journal Company, another daily newspaper published in the said City of Lincoln, for the same, like and contemporaneous service at the rate of $1.50 per one hundred words daily per month; that by reason thereof there was an excess charged to the plaintiff for the period from July 1st, 1888, at the rate of $3.50 per hundred words daily per month. Wherefore, the plaintiff alleged it had sustained damages in the sum of $52.50 per month since July 1st, 1888, being the sum of $1,785.

The Answer.

On the 15th of October following the filing of said petition the defendant filed an amended answer, upon which the case was tried, in which there was an admission of its corporate existence, and that it was a telegraph company operating telegraph lines ; it admitted the publication of the paper, and the transmission of dispatches to it over defendant's lines from the Associated Press ; it admitted a contract between defendant and the Associated Press ; admitted the payment of $75 each month for 1,500 words daily, and that the " Nebraska State Journal " received dispatches of the Associated Press for which the said " State Journal " paid the defendant the sum of $125 per month. It denied wrongful discrimination, and alleged that the charges received by it for services which it rendered the plaintiff were not unjust or excessive, and that the same were for dispatches transmitted by it in the day time, and no more than a reasonable compensation for the service rendered, and at no greater rate than it was accustomed to demand, charge and receive by other persons and corporations in the City of Lincoln and elsewhere for the same and similar services.

It also set up its acceptance of the provisions of the Act of Congress of July 24, 1866, and declared that, by virtue thereof, it was invested with an agency for the transmission of messages for the Government of the United States and the officers and several departments thereof, and that the State of Nebraska, its courts and legislature were without authority, power or jurisdiction over it, or to regulate its charges for matter transmitted from the City of Chicago to the

City of Lincoln, Nebraska, such matter being interstate commerce.

Two trials of the case were had. The trial, which resulted in the judgment which this writ of error seeks to set aside, was the second trial of the case, at which the following facts were developed:

The facts as shown in the Record.

Under an agreement dated the 1st of June, 1881, between the Western Union Telegraph Company and the Northwestern Associated Press, there had been continuously, from some time in 1883 or 1884, a service of Associated Press dispatches over Western Union wires from Chicago to Lincoln, Nebraska. The "Nebraska State Journal" was a morning paper published in Lincoln during all those years, and had from the Associated Press what is described in the testimony as a franchise for Associated Press dispatches for publication only in a morning newspaper. This service to the "State Journal" consisted of what was called "the day report" of the Associated Press, consisting of not exceeding twelve to fourteen hundred words daily, and a "night report" consisting of five to seven thousand words. This "day report" the "Journal" was permitted to use for its morning paper, but did not have the privilege of publishing the same in an afternoon paper. The "night report" was sent during the night, up to 3:30 o'clock, A. M., for the morning paper. The "day report" was transmitted whenever the same could be conveniently done through the day, when the wires of the telegraph company were not occupied with other matter, and might be transmitted, and often was,

as late as 6 o'clock in the evening. It was used by the managers of the "Journal," in connection with the "night report," to make up, a complete account of the daily news for its paper the following morning.

A year or two before the 1st of July, 1888, the "State Democrat" was started in Lincoln as an afternoon or evening paper, and desired to obtain the Associated Press "day report" as its source of news. It made application to the Associated Press for these day dispatches, and obtained a certificate entitling it, as the sole newspaper in the City of Lincoln, to receive the "day report" and publish the same in an afternoon paper (Record, p, 117). As a condition prior to negotiations with the Associated Press, it was informed, and so informed the telegraph company, that it would have to make arrangements with the telegraph company for the cost of the transmission of the report. This was required to be done before the manager of the Associated Press would even give the "Daily Democrat" a rate for the news which it was to receive (Record, p. 121).

In order that the day report could be sent to Lincoln in time for publication in the afternoon paper, the publisher of the afternoon paper was advised, as was the fact, that additional facilities in the way of wires would have to be provided, and that an additional operator would be required at Lincoln in order to handle the report in time for the use of the paper (Record, p. 122); and that to furnish these additional facilities and get the report to Lincoln in time a rate of $75 per month would be named for the service from Chicago to Lincoln. This rate was accepted, so far as the testimony discloses, without objection. The additional operator was put on, an additional wire or additional wires were strung to Lincoln, and the

service was begun some time in June, 1887 (Record, pp. 122–27).

Later, the publisher of the "State Democrat" sold the paper to the Call Publishing Company, the plaintiff, and transferred the franchise received from the Associated Press to said purchaser, and thereafter the service was rendered by the defendant the Western Union Telegraph Company to the Call Publishing Company continuously until a short time before the bringing of this suit in April, 1891. Payments to the telegraph company at the rate of $75 per month were made by the plaintiff without objection or protest. A short time before the suit was brought the manager of the plaintiff learned of the rate at which the defendant was forwarding Associated Press dispatches to the "State Journal," and thereupon he demanded of the manager of the local office of the defendant at Lincoln that the matter be righted, and the local manager not making any change in the rate, suit was brought (Record, p. 29).

The record shows that this report after the 1st of July, 1888, was transmitted from Chicago from 11 o'clock until about 4, and as it was transmitted a duplicate copy was made by the use of carbon paper. This duplicate was received by the "State Journal" some time during the afternoon or evening. At night from 7 to 3:30, the night report, varying from four thousand to seven thousand words, was received and delivered to the "State Journal," and the charge by the Western Union Telegraph Company to the "Journal" for the night report, together with the duplicate copy of the day report, was $125 per month (Record, pp. 40, 56, 57).

Testimony was also offered over the objection

of the Telegraph Company respecting the difference in rates which the Telegraph Company charged for the transmission of messages or commercial business by day and by night. There was also some testimony as to the difference between the rates by day and by night for what were known as "special press messages"—that is, single messages sent from parts of Nebraska and elsewhere to a particular newspaper containing information designed for that special paper. There is no testimony in the record except as might be inferred from that above stated that the rate of $75 per month for transmitting fifteen hundred words daily between the hours of 11 o'clock A. M. and four o'clock P. M., was an unreasonable rate. On the contrary, the testimony of the Telegraph Company showed that it was not only reasonable, but, if anything, less than the rates paid to it by newspapers for a similar service at other points (Testimony of Horton, pp. 94 and 95).

The testimony was uncontradicted that, in the day time, the wire facilities of the Telegraph Company to and from Lincoln were taxed by commercial business, market reports and stock quotations, and that it required practically the entire service of a special operator at a salary of $60 a month to take care of the report which was furnished to the Call Publishing Company, and that if the transmission of dispatches to that paper were suspended, the services of one operator could be dispensed with (Record, pp. 72, 74, 91, 92 and 104).

The testimony likewise showed that the transmission of these dispatches to the Call Publishing Company was intermittent and not continuous, but was of such a character as practically to require the continuous

attention of the operator, and that it interfered more or less with the commercial business of the Telegraph Company; that at night there was much less of this commercial business; that all the leased wires busy during the day were at the service of the defendant for the transmission of dispatches, and that the night report was transmitted simultaneously in a continuous stream, not only to Lincoln, but to a large number of other places. In other words, the day report was transmitted only to such places as published an evening paper, whose edition was large enough to afford and pay for Associated Press dispatches in any form; whereas, the night report was transmitted on a circuit touching at all the points where a morning paper was located which could afford to take the Associated Press dispatches as sent from Chicago; that the defendant company could afford to make a very much cheaper rate for the transmission of dispatches at night than by day; in short, that the conditions as to the cost and value of the defendant's service under which these dispatches were sent to the "State Journal" were essentially different from the conditions under which the dispatches were transmitted to the Call Publishing Company (Record, pp. 92, 44, 47, 51, 71).

It was claimed on behalf of the Telegraph Company that these different conditions justified it in making the difference in rates which it did make to these two parties, and that there was nothing in the case warranting a submission to the jury of the question of whether there was an unreasonable rate exacted of the Call Publishing Company, and that the case should not have been submitted to the jury.

The telegraph company, upon the trial of the case,

also insisted that the case should not go to the Jury for the following reasons :

(1) That the petition of the Call Publishing Company did not state any cause of action against the telegraph company.

(2) That there was nothing in the petition, or in the evidence, to show that the rates charged by the telegraph company were unreasonable or extortionate.

(3) That there was no evidence of any unlawful or unjust discrimination against the Call Publishing Company.

(4) That the Courts of the State of Nebraska could not take cognizance of this action to recover alleged overcharges for transmission of messages from Chicago, Illinois, to Lincoln, Nebraska, the same being interstate commerce, in the absence of legislation by Congress.

(5) That the evidence showed, without contradiction, that part of the consideration received by the Call Publishing Company for the $75 per month paid the telegraph company was the sole right from the Associated Press to receive and print the dispatches in an evening paper, and that the value of the different elements of the consideration could not be apportioned by the Court or Jury.

(6) That the services rendered by the telegraph company to the "Lincoln Journal" were not the same, like, and contemporaneous as those rendered to the Call Publishing Company, and, being different, neither

the Court nor Jury had any power to apportion such charges (Record, pp. 20, 131, 132).

Questions duly presented on the record.

These questions were presented by requests and exceptions to the refusal of the Court to charge as requested and by exceptions to the charge as given, and by exceptions to the admission of evidence respecting the telegraph company's commercial rates by day and by night, and its day and night rates for the transmission of special press messages (Record, pp. 17, 14, 15, 16, 18, 46, 47, 63, 64, 67).

The first request to charge asked by the defendant and refused by the court raises the question whether under this entire testimony the plaintiff is entitled to any recovery upon the law of the case under any view of the testimony (Record, p. 17).

The exceptions to the charges given by the court likewise raise the same question (See charges given, 2, 3, 4, 5, 6 and 7, Record, pp. 14, 15 and 16).

Errors assigned.

The following errors are assigned upon this record:

1. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the supreme court of the State of Nebraska that an attempt is made therein to regulate by means of the exercise of the judical powers of the State of Nebraska commerce with foreign nations, among the several States, and with the Indian tribes, in violation of subdivision 3, section 8, art. I., of the Constitution of the United States, and all statutes made in pursuance thereof, of

which matter the courts of said State have no jurisdiction, and immunity from which regulation under said constitutional provisions was specially set up and claimed by the plaintiff in error before the said court.

2. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the supreme court of Nebraska that all of the telegraphic messages and dispatches, the prices for the collection and transmission of which by the plai tiff in error are sought to be fixed and determined by said action, and which purport and are attempted to be fixed by said judgment, are messages and dispatches transmitted over the telegraph lines of the plaintiff in error between the City of Chicago, in the State of Illinois, and the city of Lincoln in the State of Nebraska, the same consisting in the reproduction and transmission of items of news previously collected at said city of Chicago from all parts of the world by the Press Association, and at its instance transmitted by the plaintiff in error between the two cities above mentioned, and that an attempt to regulate said prices and charges in the manner aforesaid is in violation of the provisions of the Constitution of the United States and the statutes of the United States hereinbefore mentioned, and immunity from which regulation under said provisions was especially set up and claimed by the plaintiff in error in the said court.

3. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of proceedings in said cause in the supreme court of Nebraska that the plaintiff in error is a corporation duly organized and incorporated by and under the laws of the State of New York, having its principal place of business in said State, and authorized by its charter to construct, maintain and operate lines of telegraph in and between various States of the Union, including the State of Nebraska, and that on the 5th day of June, 1867, it duly filed its written acceptance with the Postmaster General of of the United States of the restrictions and obligations of an act of Congress entitled "An Act to aid in the construction of telegraph lines, and to secure to the

Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and that its lines had been constructed and all its business had been transacted under and in accordance with and pursuant to its said charter and said act of Congress, and that by authority of said act its said lines had been constructed and were being maintained over and across the navigable rivers and public lands and traversing the various postal and military roads of the United States, and that by reason of the premises the plaintiff in error was and is obligated for the performance of certain services and subject to certain control and regulation contemplated by such act, or which may be prescribed by the Congress of the United States and the departments and official authorities thereof; by reason whereof the said plaintiff in error, ever since the 5th day of June, 1867, has been and now is a Government agency, free from regulation and control with respect to the matters mentioned in the petition in this action by a State or local authority, legislative or judicial, immunity from which control and from the judgment prayed in said petition and rendered in this action was specially set up and claimed by the plaintiff in error before the said court.

The Federal Questions.

The Federal questions presented upon this record are :

First. Is there a Federal or general common law attaching to and defining the obligations of common carriers engaged in interstate business which is enforceable by the State courts?

Second. If there is such a Federal or general common law, has it been violated by the Telegraph Company in this particular instance?

And under the foregoing, it is maintained that under the constitution, laws and authority of the United

States neither the petition nor proofs showed any cause of action against the telegraph company.

I.

Is there a Federal or general common law attaching to and governing common carriers or instrumentalities engaged in interstate commerce?

The Supreme Court of Nebraska, in passing upon the case, thus states its conclusion :

" We are satisfied from a review of the subject that in actions of the nature of the present, in the absence of national legislation, the principles of the common law or general jurisprudence of the State of the action are applicable and may be asserted and enforced, and in this State the common-law right of action is granted full force and scope. Chicago, R. I. & P. R. Co. v. Witty, 32 Neb., 275 ; Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb., 356 ; Missouri P. R. Co., v. Tietken, 49 Neb., 130 ; Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb., 70 ; St. Joseph & G. I. R. Co. v. Palmer, 38 Neb., 463 ; Union P. R. Co. v. Vincent, filed Feb. 23, 1899 " (Record, pp. 129–130).

From this quotation, it would seem that the Court in affirming the judgment in this case did so upon the theory that the enforcement of the common law, as interpreted and defined by the Courts of Nebraska, as the law of that State, entitled the plaintiff to maintain this action.

In the two preceding paragraphs the Court seems to hold the view, that there is a general common law, applying to all the States alike. We will consider this view of the case later.

It will be remembered that the plaintiff's complaint shows that he is seeking to recover back moneys paid for alleged excessive charges from July 1, 1888, to April, 1891, for the transmission of dispatches from the City of Chicago, Illinois, to the City of Lincoln, Nebraska. He paid therefor, as he alleges, at the rate of $75 per month, or $5 per hundred words daily, per month. During the same period the State Journal Company received the dispatches of the Associated Press over the telegraph lines of the defendant from Chicago, Illinois, to Lincoln, Nebraska, at the rate of one dollar and fifty cents per hundred words daily per month. Plaintiff's claim is, that he is entitled to recover the difference, or $3.50 per hundred words daily, per month, for this entire period (Record, pp. 5, 6). The contract shows that the price fixed by the telegraph company, and paid by the plaintiff was a unit, for this service from Chicago to Lincoln, and not in any way distributable or separable into parts bounded by state lines (Record, p. 122).

The first question, therefore, which arises is, *Is it possible that the common law, as interpreted and enforced by the Courts of Nebraska, can have any application to this service rendered to this Publishing Company by the telegraph Company over its lines through the States of Illinois, Iowa and Nebraska, or to any part of this service, as suggested by the Supreme Court of Nebraska in the part of the opinion quoted above?*

The claim of the telegraph Company has been at all times in this case that the regulation or control of the rates for this service were wholly withdrawn by the provisions of subdivision 3, section 8, article 1 of the Constitution of the United States, from the operation of State laws, whether statutory or common. If we are

right upon this question, the Supreme Court of Nebraska was wholly wrong upon that feature of their decision, by which they upheld the judgment in this case, upon principles of the common law as interpreted and applied in that State as a part of its jurisprudence.

It ought not to require any argument at this day in this court to the point that the question of the rates at which telegraph or other companies shall perform interstate service are wholly withdrawn from State cognizance and control. Although telegraph companies, strictly speaking, are not common carriers, yet so far as this case is concerned, we do not think it important to insist upon any distinction between their obligations to the general public and those of common carriers. This Court in Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1, in Telegraph Co. vs. Texas, 105 U. S., 460, and in other cases, has fully settled the question that the Western Union Telegraph Company is engaged in interstate commerce, and as such is entitled to the same exemptions from State control and supervision as railways or other common carriers. The rates which it shall charge its patrons, like the rates which railway companies may charge for the carriage of freights in the transaction of business between the States are alike removed from the supervision of State legislatures declaring what the rates shall be for such interstate traffic, or of State courts seeking to enforce the common law regulations and rules.

It is not necessary to make extended quotations from the cases in this Court to the effect that under this section of the Constitution the jurisdiction of Congress over this whole subject matter of rates for the carriage of interstate commerce is exclu-

sive. Since the decision in the case of Cooley vs. The Board of Wardens (12 How., 299), the rule has been consistently followed that whatever subjects of this power over interstate commerce are in their nature national, or admit only of one uniform system or plan of regulation may justly be said to be of such nature as to require exclusive control by Congress. This rule, we say, has never been departed from, but has been consistently upheld by the decisions of this Court among which are:

Crandall vs. Nevada, 6 Wall., 35, 42.
Hinson vs. Lott, 8 Wall., 148, 152.
Ex Parte McNeil, 13 Wall, 236, 242.
Case of the State Freight Tax, 15 Wall., 232, 280.
Osborne vs. Mobile, 16 Wall., 479, 482.
R. R. Co. vs. Fuller, 17 Wall., 560, 569.
The Lottawanna, 21 Wall., 558, 582.
Henderson vs. Mayor of N. Y., 92 U. S., 259, 272.
Packet Co. vs. Keokuk, 95 U. S., 80, 88.
Pound vs. Turck, 95 U. S., 459, 463.
Hall vs. De Cuir, 95 U. S., 485, 488, 497.
Ex Parte Siebold, 100 U. S., 371, 385.
Wilson vs. McNamee, 102 U. S., 572.
County of Mobile vs. Kimball, 102 U. S., 691, 697.
Packet Co. vs. Parkersburg, 105 U. S., 559, 563.
Turner vs. Maryland, 107 U. S., 38, 56.
Transportation Co. vs. Parkersburg, 107 U. S., 691, 702.
Brown vs. Houston, 114 U. S., 622, 630.
Walling vs. Michigan, 116 U. S., 446, 456.
Morgan vs. Louisiana, 118 U. S., 455, 465.
Wabash, &c., Ry. Co. vs. Ill., 118 U. S., 557, 585.

Robbins vs. Shelby Taxing Dist., 120 U. S., 489, 492.
Ouachita Packet Co. vs. Arden, 121 U. S., 444, 447.
Philadelphia Steamship Co. vs. Pennsylvania, 122 U. S., 326, 339.
Bowman vs. Chicago & N. W. Ry., 125 U. S., 465, 481.
Kidd vs. Pearson, 128 U. S., 1, 23.
Stoutenburgh vs. Hennick, 129 U. S., 141, 148.
Leisy vs. Hardin, 135 U. S., 100, 109.

The precise question involved here, so far as it relates to the common law of the State, has, we believe, not been directly involved in any of these decisions. The question in many of these cases arose upon legislation which affected, and sought to control the rates for transportation of passengers or freight over the railways, or directly affected interstate commerce in some other manner.

Is there therefore any legitimate distinction between a statute of a State enacted by the legislature, seeking to regulate or control the rates which the carrier may collect for interstate services rendered, and the common law as enforced in the State tribunals, and construed by those tribunals as applicable to the common carrier, seeking to accomplish the same end?

The Supreme Court of Nebraska decides in this case in effect that there is this difference. In Wabash Ry. Co. vs. Illinois, cited *ante*, it is very clearly implied in the opinion rendered by Mr. Justice MILLER that by no method of proceedure, whether by legislation, or by decision of its Courts in enforcing the common law of the State, could the State of Illinois control the rate of

freight for shipments beyond the boundaries of the State. He says (p. 577):

"Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and *each one of the States shall attempt to adopt its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated.* That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

If this is true with respect to a statute of the State, it is impossible to present a good reason for the proposition, that the State of Nebraska is entitled to have the service which the Telegraph Company rendered to the Publishing Company from Chicago to Lincoln, through the States of Illinois, Iowa and Nebraska, tested by the local common law of the State of Nebraska. Clearly the common law of Nebraska cannot apply to any service rendered beyond the limits of that State in view of the provisions of the Federal Constitution, and it is utterly illogical to test the rights of the Telegraph Company with regard to services rendered by it, in

the three States, as a unit, by the construction of the law as made in one of those three States. The common law is interpreted differently in the different States. It may mean one thing in Iowa and a very different thing in Illinois or Nebraska.

In U. S. vs. Worrall (2 Dall., 284), CHASE, J., said :

" Each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence,

" Through the different States it was soon discovered that the whole of the common law of England has been nowhere introduced ; that some States have rejected what others have adopted, and that there is, in short, a great and essential difference in the extent to which the common law is applied. The common law, therefore, of one State is not the common law of another ; but the common law of England is the common law of each State, so far as each State has adopted it."

The same principles and the same necessities which Mr. Justice MILLER indicates as the reason for a national regulation by Congress, apply to a statute or to an attempt to regulate rates or control the same by the application of the principles of the common law, as expounded and applied by any particular State. The difficulties attending the position of the Court of Nebraska in attempting to test this service from Chicago to Lincoln by the local law of Nebraska are obvious at a glance.

Upon this point the language of Justice MATTHEWS found in the opinion in Bowman vs. Chicago, &c., Ry. Co. (125 U. S.) at page 486, is very pertinent :

" In the present case defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State, in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept

and carry. It interposed as a defense a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extra-territorial force which does not belong to the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court, in the case of Hall vs. De Cuir (95 U. S., 485, 488) is exactly in point. It was there said: 'But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect to a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more; it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river or its tributaries, it might be required to observe one set of rules and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier or passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept

separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

We submit, therefore, that this judgment cannot be sustained upon the ground that it is in harmony with the common law of Nebraska as announced in certain decisions of the Supreme Court of that State.

There is no Federal Common Law.

If the provisions of the Federal Constitution to which we have referred, and the exclusiveness of the congressional jurisdiction over the subject of rates applicable to interstate commerce prevent the application of the statutory or common law of Nebraska, then the question recurs, IS THERE ANY FEDERAL COMMON LAW DEFINING THE RELATIONS AND DUTIES OF THE TELEGRAPH COMPANY AS A *QUASI* COMMON CARRIER, WHICH CAN BE ENFORCED BY APPROPRIATE ACTION IN THE STATE COURT?

Here, again, the decision of the Supreme Court of Nebraska is directly in a conflict with many holdings of this court and as we believe of all the other State courts which have had occasion to consider the question. For the court, in answer to the contention of the Telegraph Company that there was no Federal common law upon the subject, says:

"It is argued that the petition did not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for interstate business; that the regulation of such business rests exclusively with Congress; that the statutes

of Nebraska by which it was sought to establish rules on the subject were ineffective; that there was no regulative national law applicable and no rules of the common law in force or recognized as national rules or enforceable within the nation as an entirety, or within the States composing it or any one thereof, which in the absence of statutory enactment by Congress might be invoked and be governable" (Record, p. 129).

Then, after a review of some cases bearing upon the question, there is the conclusion already considered that the principles of the common law or general jurisprudence of the State may be asserted and enforced.

The contention was consistently and continuously made upon the trial by the telegraph company that as to the State Law it could not apply for the reasons already given, and that in the absence of a statute by Congress declaring a rule as to interstate traffic by the Telegraph Company such as was appealed to by the Publishing Company, there was no law upon the subject.

This Court has, time and time again, very clearly, as we think, settled the proposition that there is no Federal common law. In the opinion of the Supreme Court of Nebraska, that court cites the opinion of this Court, in C. M. & St. P. R. R. vs. Solan, 169 U. S., 133, as fully recognizing a law of general jurisprudence which might be applied in a State court or in a Federal Court (Record, p. 129). But an examination of the opinion of Mr. Justice GRAY in that case shows, that, in writing the opinion, there was not in his mind any thought of a general Federal common law, which applies to railroad carriers engaged in interstate commerce. For he says (p. 137):

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to those laws. It is in

the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in business of interstate commerce, is answerable according to the law of the State for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, being engaged in the transportation of passengers, he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. * * * It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and punish. The rules prescribed for the construction of railroads and for their management and operation designed to protect the person and property otherwise injured by their use, are strictly within the scope of the local law thereof in this regulation of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce."

This Court has, moreover, in a long line of cases, settled the question, as we think, conclusively, that there is no national common law. The courts of the United States do in actions between citizens of different States, enforce a common law constantly, but it is the municipal law or common law of the State which is thus enforced and not a national common law.

Perhaps the fullest consideration of this question is found in the opinion of Mr. Justice MATTHEWS in Smith vs. Alabama (124 U. S., 465), in which case was considered the question of the right of the State of Ala-

bama to enforce a requirement that engineers handling trains for the transportation of passengers or freights in or through that State, should first undergo an examination and receive a license from the State. Upon the precise question we are considering, Justice MATTHEWS says (p. 476) :

" It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee and at the right time or place, he is liable in an action for damages, under the laws of the State, in its courts ; or if by negligence in transportation, he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. * * *

" But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employed him ; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress, or presumed to be adopted by it, there can be no rule of decision based upon the rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation and prescribe the rights and duties which it implies, then there is, and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists and is the mode by which it adopts, for cases within the scope of its power, the State law, which until displaced covers the subject.

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. Wheaton vs. Peters, 8 Pet., 591. A determination in a given case of what that law is may be different in a Court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercises an independent, though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. vs. Lockwood, 17 Wall., 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of the State."

In Wheaton vs. Peters, 8 Pet., 591, Justice M'LEAN says (p. 658):

"But, if the common-law right of authors were shown to exist in England, does the same right exist and to the same extent in this country?

"It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution and laws of the Union. The common law could be made a part of our federal system only by legislative adoption. * * * It is insisted that our ancestors, when they migrated to this country, brought with them the English common law as part of their heritage.

"That this was the case to a limited extent is admitted. No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any State in this Union. It was adopted so far only as its principles were suited to the condi-

tion of the colonies; and, from this circumstance, we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States must determine how far the common law has been introduced and sanctioned in each."

In Bucher vs. Railroad Co. (125 U. S., 555), in the opinion by Mr. Justice MILLER, at page 583, it is said:

"There is no common law of the United States, and yet the main body of the rights of the people of this country rests upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs and common law (Wheaton vs. Peters, 8 Pet., 591; Pennsylvania vs. Wheeling Bridge Co., 13 How., 519)."

To the same effect is Willamette Iron Bridge Co. vs. Hatch, 125 U. S., 1.

The whole question is also carefully considered in the opinion of Justice BETTS, printed as appendix to case, *in Re* Barry, 136 U. S., p. 597:

Cases in Point.

But upon the precise question we are considering in the case at bar there have been several decisions which are directly in point.

In Swift vs. Philadelphia & R. R. Co. (58 Fed. Rep., 858) this question was raised in the Circuit Court of the United States for the District of Illinois, before Judge GROSSCUP, upon suits brought against the railway company to recover back alleged illegal exactions for the transportation of freight from Chicago to New York. The question was raised by a demurrer to the declaration filed, and involved the precise point presented

in this record. Judge GROSSCUP says, page 859, upon this question :

" The general question raised by the demurrer is whether there is any law, common or statutory, applicable to the transaction set forth, which prohibits the exaction of unreasonable rates, or affects any contract between the shipper and carriers whereby unreasonable rates are stipulated for and taken. There can be no question that, in the absence of such prohibition or restraint, a common carrier can lawfully demand or contract for such compensation for carriage as he may be able to obtain. His privileges would in such cases be like those of any other person, and subject only to the economic laws which flow from trade and competition. If there is any municipal law which supersedes or supplements these economic laws, and subjects the carrier to restraints or regulations not imposed upon general business, it must be found either in the municipal law of the States or in a law of the United States.

" It is not disputed that within the territory of the States and upon subjects affected by state law, such a prohibition exists. It is one of the restraints embodied in the common law of England, and is, therefore, in force within every jurisdiction where the common law is the law of the land. It seems to me equally clear that, outside of the interstate commerce act, there is no law of the United States, as a distinct sovereignty, imposing such restraint. The United States as a distinct sovereignty, imposes no laws upon its subjects, except such as are expressly or impliedly enacted by Congress. Congress has not adopted the common law of England as a national municipal law. The courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject matter was affected. Outside of the interstate commerce act there is no enactment of Congress and no self-operating provision of the Federal Constitution which expressly or by implication evidences a command or purpose to interfere with the freedom of interstate commerce, or lay any restraint upon the rights of carriers or shippers engaged therein (Welton vs. State of Missouri, 91 U. S., 282; Brown vs. Houston, 114 U. S., 622).

" The question then arises, Is the municipal law of the state applicable to the transactions set forth in the

declaration? Is the act or contract of a carrier who accepts goods for carriage from one State into another, subject to that particular provision of the municipal law of the several states where the goods are taken or through which they are conveyed, which prohibits the exaction of unreasonable rates? There can be no doubt that to congress is given, by the constitution, the absolute power to regulate commerce between the states. This power, independently of legislation, is not necessarily exclusive of the right of the states to reasonably regulate such incidents of interstate commerce, lying within their respective jurisdictions as wharves, pilots, harbors, roads, bridges, etc. * * * The application of state law in such cases is not inconsistent with the general power conferred upon Congress, and does not introduce into commerce between the states either confusion or restraint. * * * But the fixing of a rate for the carriage of goods from one state to another is not simply an incident of or appurtenant to commerce, but is the very core and essence of interstate commerce. * * * How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio or Pennsylvania? The reasonableness of such rate depends among other things upon the cost of construction and wages paid beyond her jurisdiction; the amount of capitalization allowed and taxes and assessments exacted by other jurisdictions; the terms of contracts for the interchange of freight between carriers, made and allowed under the laws of other states, and the amount of traffic carried which may in turn be affected by the laws of the other states governing the acquisition of or consolidation with other lines. These and many others are the elements of the cost of carriage, and before the reasonableness of a rate can be determined the cost must be ascertained. The reasonableness of rates for such long distances and over different methods of conveyance can only be approximately ascertained at best by men of special learning and equipment in such matters. Is it possible that the constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line 1,000 miles long? I am of the opinion that a rate for the carriage of interstate commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business, and interpretation of the laws of different states, is essentially a national

affair, and its regulation is therefore exclusively national. * * * It follows, therefore, that in my opinion the local municipal law of the several states is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these."

The foregoing opinion by Judge GROSSCUP was followed by a second opinion in the same case reported in the 64th Federal Reporter, 59, where the question was again presented to the same judge, who carefully reviewed his former opinion, and reached the same result. He says (p. 69):

"Having duly considered these criticisms upon and variations from my former holding by some of the judges of the other circuits, I remain of the opinion that there is no national, common or general law, in the sense of a rule of civil conduct, prescribed by the nation as sovereign which may be made the basis of an action to recover back rates, simply because the court may find them to be unreasonable. So far as existing law applicable to the subject of rates in interstate commerce was concerned prior to the interstate commerce act, the shipper and carrier were at liberty to make such contract as they could agree upon; and such a contract would be left untouched, unless for such reasons as would justify the abrogation of contracts between other parties and upon other subjects."

Later the question was presented to the Supreme Court of Iowa in the case of Gatton vs. Chicago, R. I. & P. Ry. Co. (95 Iowa, 112). This was an action to recover overcharges on freight shipped over defendant's line between interstate points of railway, before the interstate commerce law took effect. To the petition filed the defendant pleaded the statute of limitations for one defense, and as another and separate defense that all of said shipments were interstate shipments and pertained exclusively to commerce between the

States; that when said shipments were made the Congress of the United States had not enacted any statute regulating or pertaining to shipments of that character, and that the power to regulate commerce between the several States was vested exclusively in Congress, and at the time the shipments were made there was no statute, or any rule of common law governing or applicable to said shipments or prohibiting any discrimination or preference in rates. To these defenses the plaintiff demurred, and thus was raised the precise question which we have presented upon the record in the case at bar. The court consider the following questions, first, whether there is any national common law which is applicable to shipments of this character; second, whether Section 8 of Article 1, subdivision 3, of the Federal Constitution excludes the jurisdiction of the States. After a very careful and thorough consideration of the authorities bearing upon the subject under both heads, to which we invite the careful attention of this court, the Court say:

"No right of recovery, then, in this case is or can be given by virtue of the statutes of the states, it being a matter exclusively within the jurisdiction of Congress. No statute of the United States creates a right in such cases. If, then, there exists any right of recovery, it must be by virtue of the existence of the common law as a recognized part of our national system of jurisprudence. We have said that the constitution of the United States did not of itself recognize the common law as a system of jurisprudence of national application. Even if it should be conceded that efficacy could be given to such a system and make it of national application, in the absence of constitutional or statutory recognition, by means of judicial decisions of the United States Supreme Court, a point not necessary for us to decide, do the decisions of that court go that extent? That court has never determined the precise question involved in this action, but it has passed upon questions of interstate commerce and its attempted regulation by the states."

Then after further consideration of the cases claimed to support the contention that there was a national common law, the Court say:

" Counsel contend that the common law of the several states 'is one entire body or system of law, and its rules and principles are the same,' no matter in what state they may be administered. If it be true that the rules and principles of the common law are the same in all of the states—a proposition which we think is hardly true—still it is true that the same common law is differently construed in the different states and jurisdictions. Thus, in one state it may be held that the common law did not permit discriminations and in another that it did. Hence it is that we find the federal courts in certain cases, some of which we have quoted, holding that in determining what the common law, as enacted, adopted or recognized by the state, is, they will not be bound by the interpretation given thereto by the state courts. Again, it is undeniable that in any state in which the common law may be in force, the legislature may alter it or set it aside. So if the appellant's contention is correct and the common law applicable to each state should control as to regulating charges for interstate commerce, we might have one common-law rule affecting such shipments in Iowa and a different rule in Illinois, or the same rule differently interpreted. The result would be that an act of the carrier of an interstate shipment through Iowa and Illinois might be legal in one state and illegal in the other. It is manifest that such a state of affairs cannot exist. *So, too, in this* connection it may be said that inasmuch as the constitutional right conferred upon Congress to regulate interstate commerce is exclusive—and as we have shown, it is held that, in the absence of legislation by Congress upon the subject, it was manifest that Congress intended to leave such commerce free and unfetterd by any positive regulations—such intention would be contravened as much by any common-law rules operating as regulations of such commerce as by an express statute of the state having a like effect. In other words, the power to regulate interstate commerce has, by the Federal Constitution, been withdrawn as a subject of legislation from the several

states, and the constitutional provision seems to us to be equally effective as against such regulations based upon any common-law rule in force in a state. This view, we think, is clearly supported by the cases heretofore cited. * * *

" There are other reasons which impress us with the correctness of the result reached by the lower court, but we must forego a discussion of them. Our conclusion is that there is no national common law ; that the state cannot regulate inter-state commerce in the absence of congressional action, either by express statutory enactment or through the medium of the common law which may be recognized as in force in such state ; that the right claimed in this case would amount to a regulation of commerce between the states, as defined by the Federal Supreme Court, and hence is in contravention of the Federal Constitution."

The Supreme Court of Nebraska, in support of the conclusion that there is a law of general jurisprudence which might be applied by a state court, cited the American and English Cyclopedia of Law, second edition, vol. 6, pp. 285, 286. But an examination of this citation utterly refutes the suggestion contained in the opinion that it sustains any such doctrine. At page 285 the text thus states the principle :

"6. National Common Law. It is well settled that the common law constitutes no part of our national jurisprudence. The several states composing the Federal Government are sovereign and independent, possessed of their own customs, usages and common law, and no principle pervades the union which has not the the authority of and is not embodied in the constitution or laws of the national government. The common law could be incorporated into the federal system only by legislative adoption."

Note 4 to this paragraph is as follows :

" 4. No national common law," citing :

Wheaton vs. Peters, 8 Pet. (U. S.), 658.
Bucher vs. Cheshire R. Co., 125 U. S., 558.

Kendall vs. U. S., 12 Pet. (U. S.), 613.
U. S. vs. Hudson, 7 Cranch (U. S.), 32.
U. S. vs. Coolidge, 1 Wheat. (U. S.), 415.
U. S. vs. Worrall, 2 Dall. (U. S.), 384.
Moore vs. U. S., 91 U. S., 270.
In re Barry, 42 Fed. Rep., 113.
Murray vs. Chicago, etc., R. Co., 62 Fed. Rep., 24.
Lorman vs. Clarke, 2 McLean (U. S.), 568.
People vs. Folsom, 5 Cal., 374.
Faust vs. Judge, 30 Mich., 266.
See, also, Bains vs. The Schooner James, 1 Baldw. (U. S.), 544.
Forepaugh vs. Delaware, etc., R. Co., 128 Pa. St., 217 ; 15 Am. St. Rep., 672.

In other State courts, where the question has been raised, the same conclusion reached by Judge GROSSCUP, and by the Supreme Court of Iowa seems uniformly to have been reached. Thus, in Garner vs. Wright, 52 Ark., 388, it is said with respect to a controversy over a mortgage between citizens of the Indian Territory, where no proof was offered of the laws in force in the Territory applicable to the matter, and the question was whether the presumption obtained that the common law was in force, the court say :

" This presumption is indulged as to those states only that have taken the common law as the basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the states of Louisiana and Texas, because we know that their jurisprudence is founded upon a different system. The same reasons forbid such a presumption as to the laws of the Indian Territory, for we know that no system of law has been adopted there. * * * There is no federal law on the subject. We have no proof of and can indulge no presumption as to local laws in force there."

Likewise in the case of People vs. Folsom (5 Cal., 374), where a question arose respecting the right of succession to the property of a subject of Denmark, who died seized of property in California, the court say (p. 378):

"On the death of Leidesdorff, his mother, by the rule of natural justice, became entitled to the possession and could not be disturbed until office found. No such judicial proceeding was instituted and no act of the Mexican government was done to divest her defeasible estate. While things remained in this condition the treaty was ratified, and California became a territory of the United States. With the change of flags there was a change of political laws.

"It now remains to be seen whether this was a political law or not. The authorities that I have cited, as well as the ordinances and decrees of Mexico cited by the Attorney-General, leave no room to doubt this. If laws regulating the admission of foreigners and aliens and placing them under peculiar disabilities on account of some supposed inconvenience which may result to the state are not political, it would be difficult to find any law that was. Now, there is no common law of the United States, as contradistinguished from individual states, and the courts of the United States, instead of administering the common law or any particular system, conform to the laws of the states where they are situated; so that the acquisition of California did not extend over it the common law which recognizes and sustains the doctrine of escheats; for in that case there would have been a continuation of the same political law; but, in the absence of any law on the subject, the principles of the common law would prevail as well as the principles of jurisprudence that any one may inherit who is not expressly prohibited."

In Phipps vs. Harding (70 Fed. Rep., 468) the question of the existence of a general commercial law was presented to the Circuit Court of Appeals of the Seventh Circuit. The question arose upon the endorsement of a promissory note, where parties had placed their names upon the back before delivery to the payee.

It was claimed that the general commercial law could not be affected by a statute of Massachusetts relating to this subject. Judge JENKINS, delivering the opinion of the court, says (p. 475):

"The contention that this statute of Massachusetts is invalid and inoperative goes to the extent of depriving the state of power to legislate with respect to the law merchant. It presents a bold and far-reaching proposition, striking at the root of power in the respective states to which we are not prepared to yield assent. We are referred to no provision of the Constitution which expressly or impliedly inhibits the exercise of such power by the state. The contention assumes that there is a commercial law of the United States distinct from and independent of the law of the states. Whence came it and how was it adopted? Was it the common law of England or the civil law of continental Europe? Was it a law appropriated by the nation upon the adoption of the constitution? It must, then, be universal in its application throughout the nation, overriding all state laws upon the subject and all right of the states to legislate. We know that most of the states are governed by the common law of England as modified and adapted to the peculiar circumstances and conditions of each, and that one state at least is governed by the civil law. And we know, moreover, that the commercial law existing in these various states, while alike with regard to underlying principles, is widely different in many essential respects. There is no common law of the United States, except, possibly, as the common law of England has been adopted with reference to the construction of powers granted to the federal union."

The only case which we have been able to discover where there has been a holding that there is a general common law applicable to interstate shipments, is the case of Murray vs. Northwestern Ry. Co. (62 Fed. Rep., 24), in which the same question which was presented to Judge GROSSCUP was presented to Judge SHIRAS, who held that an action could be maintained against a carrier for the recovery of excessive

charges collected for interstate shipments made prior to the passage of the interstate commerce act. His conclusion appears at page 42 as follows :

" The transaction out of which the present controversy arises pertain to interstate commerce. The defendant company when engaged in transporting grain and cattle of plaintiff from Iowa to Chicago, Ill., was acting as a common carrier of property, and assumed all the duties and obligations pertaining to that occupation. In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has a right to apply the rules of the common law unless the same have been changed by competent legislative action ; and, therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

II.

If there is such a Federal or General Common law, has it been violated by the Telegraph Company in this particular instance ?

We come now to consider, however, the question in another aspect ; and that is, if we are wrong upon the proposition hitherto argued, and there is a federal common law which does govern the relation of the parties to this cause, was there any evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained, and the judgment entered thereon.

The plaintiff was the publisher of an afternoon newspaper, and required for the purposes of that paper that

the Associated Press dispatches which he was to receive under the arrangement with the Associated Press, with the sole right to publish them in an afternoon newspaper in Lincoln, should be transmitted to him not later than four o'clock in the afternoon of the date of publication. He did make the arrangement with the Associated Press for the right of publication, or, as the Supreme Court of Nebraska say, they sold the dispatches which would enable him, to make the arrangement with the Telegraph Company for their transmission. Accepting that version of the matter for the present, he made his arrangement with the Telegraph Company for the transmission of those dispatches in such a way that they would be available to him for publication in his evening paper. To do this required on the part of the Telegraph Company an increase in its force by adding an additional operator, and the increase of its facilities from Omaha to Lincoln by the stringing of another wire, all of which was done primarily for plaintiff's benefit. The rate for this service thus to be rendered to the plaintiff was named, and it is to be carefully noted that there is not a word in the petition to the effect that the rate named for the services was an unreasonable rate for the services rendered (Record, pp. 4, 5, 6). It is alleged to be excessive and unjust by way of comparison with another rate named to the "Daily State Journal"; but that is the extent of the averment in that regard.

The testimony likewise fails to disclose that, as compared with the rate charged by the telegraph company to other evening papers receiving a like report, the rate is excessive or unreasonable; for the testimony upon that subject supplied by Mr. Horton on behalf

of the defendant and entirely uncontradicted is not only that the rate named to the "Lincoln Call" was reasonable and not excessive, but he also furnishes facts showing that the rates paid by other evening papers for the day report was as much if not more than the rates paid by the "Lincoln Call." Thus he says (Record, p. 93):

Q. I will ask you, Mr. Horton, whether or not $75 a month for the delivery of the Associated Press report, afternoon report to the "Lincoln Call," from 1887 to 1891, for from fourteen to fifteen hundred words, was an excessive rate? A. It was not.

Q. Is there any other afternoon paper in the United States, within a like distance from Chicago, receiving that report, or did it receive that report during that time for any less than $75 a month over the Western Union wires, if you know? A. Not to my knowledge.

And further at page 94:

Q. You give me a list of papers—I mean give me the list of charges made to other papers? A. The rates for telegraph tolls—I have a list of the charges made to other papers, the list of telegraph tolls. I fixed them myself.

Q. What towns did these include? A. Well, there is one at Durango, Colorado.

Q. What others? A. There was at that time one at Albuquerque, New Mexico, El Paso, Texas, Colorado Springs, Colorado.

Q. Well, do you know what rates they were paying the Western Union for this afternoon report? A. I do.

Q. I will ask you, Mr. Horton, if the convenience for the transmission and delivery of reports there were any different than they are here? A. I do not think they were any more favorable than here.

Q. Were they less favorable than here? A. The report was transmitted from Denver, and in some cases was less favorable; the tolls were greater; but we had a greater amount of wire.

Q. Then I will ask you what these rates were?

By Mr. Stewart: Was it as large a circuit as here—take in as many points? A. The day circuit, at that

time, I think, took in more points—no, probably about the same. Every once in a while a city would drop out.

By the COURT: Did these reports come from Chicago?

A. Sent from Chicago to Denver and there re-edited and practically a new report made of them. El Paso was the farthest point served from Denver. They paid us $60 a week for the day and night report. Albuquerque paid us $30. Colorado Springs paid us $20 a week. That was the nearest point to Denver. That has been discontinued since. There was a number of towns in Kansas took the same like report. Kansas City got practically the same report and our telegraph tolls there I can't remember just now, but none was less than $75, charged to the Association, and some was $85, and $96 at Emporia, and I think at Wellington, Salina and Atchison. We served them all, I think.

A. Where from? A. Kansas City.

Q. I will ask you again what, if any, was the difference in facilities for supplying the towns you have mentioned over the Colorado District and the town from Kansas City and Lincoln here. A. At what time?

Q. From 1887 to 1891. A. Well, we never attempted to start the service and would not make any figures until we had the facilities to start it and handle it properly; so the facilities had to be complete wherever we delivered the report. That is one reason why we did not send it here when Calhoun first wanted it.

Q. Was there any difference in the cost to the company between supplying these points from Denver and Kansas City and this report at Lincoln? A. Practically none. There might have been a little difference in the western circuit—might have been a little more there.

Q. Since this suit arose between the old Call and the Western Union Telegraph Company, I will ask you if the direct contract between the new Call Publishing Company and the Western Union has been abrogated? A. There has been a change, yes, sir.

Q. To whom now does the Western Union look for its pay? A. To the Northwestern Associated Press.

Q. Do you know what the present Call Company has to pay to the Associated Press for the same services those gentlemen were getting? A. Yes, sir.

Q. How much was it? A. One hundred and eight dollars a month; that includes everything. It amounts

to that. Twenty-five dollars a week amounts to about $108 a month.

Q. It is the same afternoon report, under the same franchise that Mr. Bushnell and Mr. Cox had with the old concern. A. It is the same report; yes, sir.

Q. That is, from the same Association. A. Same association and report; yes, sir. Well, I don't know, either. I beg your pardon; I think it is the Associated Press now.

There is no averment in the pleadings, nor any attempt in the case by any evidence anywhere to show that the rates paid by these afternoon papers thus shown to be substantially the same as to this plaintiff, was an unreasonable, excessive, or unjust rate for the services rendered.

An attempt was made to set up in the petition a standard of comparison with the rates to the "Daily Journal," as follows;

"4. That during all said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company as against this plaintiff and gave to the State Journal Company an undue advantage in this, that while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid $75 per month for such despatches, amounting to fifteen hundred words or less daily, or at the rate of not less than $5 per hundred words daily per month, it charged and collected from the said "State Journal" for the same, like, and contemporaneous services only the sum of $1.50 per hundred words daily per month", (Record p. 5).

On turning to the testimony we find this allegation of the petition not only not sustained, but directly contradicted. So far from the services being the same, like and contemporaneous, the facts, are as we have already stated them respecting the transmission of this afternoon report, that it was transmitted between 11 and 4 o'clock, when the wires of the Telegraph Com-

pany were crowded with other business (See testimony of Bushnell, p. 27; testimony of Syford, pp. 42, 47, 54, 55; testimony of Carlton, pp. 71, 72, 74, 84, 85; testimony of Horton, p. 82; and testimony of Hathaway, p. 110).

So far from the report to the "State Journal" being the same, like, and contemporaneous service," all the testimony of the plaintiff, as well as the testimony of the defendant, agreed upon the fact that the service to the "Daily State Journal" was a service at night, and the report transmitted was continuously transmitted from 7 o'clock or thereabouts in the evening up until, perhaps, 3.30 in the morning. The only foundation for the suggestion that there was a contemporaneous transmission to the "Journal" is found in the fact that, prior to the time when the "Call" made its arrangements for the transmission in time for the publication of the afternoon paper, the "Journal" had been receiving from the Associated Press, under a franchise for a morning paper, a night report, and the day service was transmitted to it, to be used, so far as it saw fit, for its paper the following morning. This was so far continued that when the arrangement was made for the transmission of the 1400-word report for the "State Democrat," that the operator made a carbon copy—that is, at the same writing at which he received a report for the "State Democrat," or later for the "Daily Call," he wrote out two copies and delivered the duplicate carbon copy at some time in the afternoon or evening to the "State Journal," which sometimes used it and sometimes did not use it (Testimony of Bushnell, p. 40). In making the comparison of the volume of words received by the two papers, therefore, this manifold copy of the afternoon report

thus made and handed to the "Journal," and which it might use or not, as circumstances dictated, is included in the number of words alleged to have been transmitted by the Western Union to the "Journal," and made the basis of the comparison upon which the alleged excess is sought to be recovered (Testimony, p. 41).

It further appears that this night report was transmitted in a continuous stream; that the wires were so far relieved from the pressure of other business during the night and the report was so arranged and edited at Chicago that a single operator was continuously employed from the time the report started until it was finished. Whereas, the operator who was employed to take the press report in the day time was practically unavailable for other work, because the press report came along at irregular intervals (Testimony of Syford, p. 45; Testimony of Carlton, 74, 75; Testimony of Hutchison, p. 103).

In the testimony two other alleged tests for the purpose of showing discrimination and excessive charge to the Call Publishing Co. were presented by the Call Publishing Co. over the objection of the Telegraph Company and subject to its exception.

One was the difference in the telegraph company's night and day rate for commercial messages—that is, ordinary single messages—which the testimony shows averaged considerably less than 10 words each (Testimony of Syford, p. 48).

The other basis of comparison was the alleged difference between day and night rates on "special press messages"—that is, not messages sent as the matter sent from Chicago was sent—to many newspapers on a circuit simultaneously, but special messages collected and sent direct to the particular newspaper desiring

it, corresponding in that respect to a commercial message, although usually containing a greater number of words. The day and night rate upon both of these classes of messages was shown, and it was claimed that it demonstrated that inasmuch as the day rate thereon was not in any instance more than twice the night rate, that this clearly proved that the rate charged to the Call Publishing Company for its service was too great because it was much more than double the rate charged to the "Journal," considering the number of words transmitted (See testimony of Bushnell, pp. 63, 64, 65; Testimony of Seacrest, p. 67).

But the question which we now present is: DO ALL THESE FACTS, GIVING THEM THEIR FULL FORCE AND WEIGHT, SHOW UNJUST DISCRIMINATION IN FAVOR OF THE "STATE JOURNAL" AND AGAINST THE PLAINTIFF?

Under the principles of the common law we insist that these services are so different in kind, quality and character that no basis of comparison is afforded by either as to the rates of the other. In the case of the afternoon report to the plaintiff, the Call Publishing Company, it was a report which required a practically continuous service of an operator for as many hours, under the testimony, as the night report required. It was pushed in upon the wires at a time when those wires, under all the testimony in the case, were overburdened with commercial business, much more profitable for the telegraph company to handle than press matter. The night report was received at a time when the facilities were otherwise comparatively idle. It is true that the operator was continuously employed on the night report for about the same number of hours as the operator in the daytime; his pay was substantially

the same. In that respect the principal item of cost of transmission of the transmission of the reports did not materially differ, so far as this particular place was concerned. So far as the number of words was concerned, the telegraph company was doing a wholesale business instead of a retail.

It is evident that the comparative rates charged for commercial messages by day and by night did not afford a fair basis of comparison, for it was an entirely different class of service. So likewise with the special press messages; that service differed in all its essentials, being largely similar to the handling of commercial messages or single messages. It is also to be remembered that the circuits over which the Associated Press reports are sent by day and by night differ very materially; a circuit serving day papers, or those taking the night report for a morning publication, comprehends many more papers for which the report is received than a circuit taking a day report for an afternoon publication. This has to be taken into account in fixing the price for the afternoon paper.

All these considerations very strongly militate against the underlying principle contained in the instructions to the jury given by the Court, upon which the jury proceeded to find the verdict in this case, viz., that the word-rate furnishes a legitimate basis of comparison between entirely different classes of service. The testimony in this case, we think, clearly establishes the proposition that the mere fact that a certain price per word or per hundred words is charged in one case, and a very much less price in another case does not in any way tend to establish that the one is unreasonable, or that there is any discrimination. In fact, nothing would be more mislead-

ing than to undertake to classify the different kinds of services which the Telegraph Company renders and consider the rate purely upon the word basis.

A slight analysis of the testimony in this regard relating to the different classes of service will bring this out in a very clear light. On commercial messages the day rates between Chicago and Omaha at one time were 60 cents for ten words or less, with a charge of four cents for each extra word. At the time of the trial the day rate on such messages between Lincoln and Chicago was 40 cents, with a charge of three cents on each extra word. This is at an average of four or five cents a word for such messages. The lowest charge for such messages for shorter distances was from 25 to 30 cents for messages of ten words or less, with a charge of two cents for each extra word; that is to say, the minimum charge per word for commercial messages was 2½ to 3 cents and an average charge was one and a half to two times that amount (testimony of Syford, pp. 48, 49).

For special press messages, the day rate was one cent per word and the night rate six words for a cent. (Testimony of Bushnell, pp. 64, 65.) For the press reports the day rates were six words for a cent. Here is a great difference between the charge of 2½ to 5 cents a word to the general public for commercial messages, and one-sixth of a cent per word to the complainant in this case. These rates show a charge to the general public of from twenty-five to thirty times as much as the rate to the Call Publishing Company in this case.

The testimony of Mr. Syford, the plaintiff's witness, tends to an explanation of the difference. He testifies that a good average sending for an operator is about thirty words per minute. The sending of a ten-word

message would take about twenty seconds, for which the Telegraph Company received 40 cents,or four cents per word, if the message were from Chicago to Lincoln. For the same price the " Lincoln Call " would receive 240 words. But the commercial message must be prepared in the office of the Telegraph Company, and the company must furnish the necessary paper, pens, and ink, each being an item of expense. It must then be handled over a counter by a clerk, whose duty embraces the reading of the message, in order to correct any illegibility in the name and address of the person to whom the message is addressed and the name of the sender. He must note on the margin the time of the receipt, the number of words, and the tariff charge; and receive payment for the message, and then forward it to the operator who is to send the message. The operator has to observe most of the items noted on the message by the clerk, call up the operator at the other end of the line, wait until his call is answered, and then the message must be sent. The operator receiving the message takes the different items which we have noticed and copies them. After the message is fully transcribed by the operator with copying ink, a letter-press copy must be made of it, after which it is put into an addressed envelope, and turned over to a messenger whose duty it is to find the addressee. If the messenger is unable to find him, a message of inquiry is sent from the receiving office back to the sending office, and it is then the duty of the latter office to look up the sender of the message as speedily as possible and deliver him a copy of the inquiry, and receive from him a more definite address, which has to be immediately wired back to the office of destination of the message,

whereupon the message is again placed in the hands of the messenger for a new attempt to find its address. Coupled with all this are the risks arising from the fact that the large bulk of these messages concern commercial transactions, and a failure to send correctly is liable to involve the company in claims for damages and litigation. All these and many other items of expense have to be taken into the account in fixing the price for the transmission of a message of this character.

As against this special service and the care which has to be taken to avoid loss, the newspaper day specials, for which a charge of one cent a word is made, are sent during the daytime from various points where the newspaper has correspondents. They relate usually to items of general news. A mistake or change of a word does not involve liability for loss and damage. They do not require the same calculation, the same memorandum by the clerk. They involve practically only the counting of the words and a noting on the message of these facts. The party to whom such messages are addressed is usually some well known newspaper. There is no delay or difficulty in the delivery. The whole element of risk and insurance of the accuracy of the contents of the message is eliminated. In addition must be considered that they average many more words than the commercial message. It is evident that they can be sent very much cheaper per word than the ordinary commercial message.

In the case of the press reports again, there are the different elements to which we have called attention *(ante* pp. 6–8, 41–43*)*. In the case of the afternoon press report, it has to be transmitted at the time when the Telegraph Company's facilities are more or less crowded

with commercial business, but it differs very materially from the handling of the ordinary commercial message. It is a report which has to be edited by the Associated Press; it is then filed at one of the offices of the Telegraph Company, say Chicago, where the words are counted; but it is transmitted upon a circuit, like that, for instance, upon which the day report was sent to the "Lincoln Call"—that is, upon a circuit which included a number of other cities receiving this same day report on the line of the Telegraph Company, the number of these points being determined by the number of papers within reach of Chicago to which this day report could be transmitted simultaneously. It is evident that where the report consisted of a large number of words, many times that of the ordinary commercial message, and where it was transmitted by one operator to a large number of places simultaneously, the rate per word for each of those places could be much below that at which it would be possible to send without loss an ordinary commercial message.

The night report simply carries the reduction still further, because while the day report, as shown in this case, amounted to a maximum of 1,500 words under the arrangement, the night report consisted of 5,000 to 7,000 words. It was sent to a larger number of newspapers upon the same circuit, because the morning papers outnumbered in the same territory the evening papers, and the night report is for morning publication. And from this fact alone it can readily be seen that it is quite possible that the aggregate compensation to the Telegraph Company from serving this night report, even at its lower word rate, might be very much greater than that realized by serving the day report at its higher word rate.

Further, this night report, as the testimony shows, was sent in a continuous stream, requiring one of the best operators to receive it; but it occupied his entire time during the period over which it was thus sent without interruption. In this respect it differed from the day report, which, while it required that an operator should always be ready to receive it between certain hours, still his time was not fully occupied for the reason that the report was not so edited that it could all be sent when the operator was first called to receive it; but it was transmitted in installments. It is evident that, to send a report of this class at night, when the facilities, in which the Telegraph Company has its capital invested, would otherwise be largely idle, the Telegraph Company could afford to do it at a very much less word rate than by day, and that compared with the day service the relative word rate would be very different from the ratio existing between the rate for transmission of a commercial message or a newspaper special message by day, and the rate for transmitting a similar message by night.

Nothwithstanding these very marked differences in the conditions under which these different classes of messages were sent, this case was sent to the jury by the court, under instructions which practically assumed that the conditions surrounding the Telegraph Company in transmitting night press dispatches and day press dispatches in nowise differed from the relative conditions affecting the Telegraph Company in sending commercial day messages and commercial night messages, or newspaper day specials and newspaper night specials.

We may get some light upon the proper rule upon this subject from decisions relating to common carriers,

and their obligations, for certainly the obligations of the Telegraph Company to the public are no more stringent than those of a common carrier.

In Hays & Co. vs. Pennsylvania Company (12 Fed. Rep., 309) Circuit Judge BAXTER had occasion to consider the question of what constituted discrimination by a railroad company in its rates for freight. He says (p. 311):

"It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that might arise. It may, however, be said that it is only when the discrimination occurs to the undue advantage of one man, in consequence of some injustice inflicted upon another, that the law intervenes for the protection of the latter. For instance, the carrying of one person who is unable to pay fare free is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. * * * Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodation furnished to each, because it costs less to carry an emigrant with the accommodations furnished to that class than it does to carry an occupant of a palace car."

This Court in Interstate Commerce Commission vs. Baltimore and Ohio R. R. Co. (145 U. S., 263), sustained a rate of two cents a mile to parties of ten or more as against three cents per mile to the ordinary passenger, the court holding that such a difference was not in any sense an unjust or unreasonable discrimination, even under the interstate commerce act.

Justice BROWN says, page 279:

"Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the

Interstate Commerce Act (24 Stat., 379, c. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (Fitchburg Railroad Co. vs. Gage, 12 Gray, 363; Baxendale vs. Eastern Counties Railway Co., 4 C. B. [N. S.], 63; Great Western Railway Co. vs. Sutton, L. R., 4 H. L., 226, 237; *Ex Parte* Benson, 18 South Car., 38; Johnson vs. Pensacola Railway Co., 16 Florida, 623), though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

In the same case at circuit (43 Fed. Rep., 44), Justice JACKSON says:

"The act to regulate commerce does not undertake to deal with the subject of rates for the transportation service or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not and was not intended to restrict the common-law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make low rates, based on increased quantity or amount of service. No case arising under the English railway acts of 1845, 1854 and 1873, so far

as we have been able to find after careful examination, has ever called in question or impeached the right of carriers to fix rates and issue tickets based upon the consideration of the amount or volume of the traffic, nor disputed the reasonableness and sound business propriety of railroad companies granting reduced rates to parties traveling often or furnishing increased traffic in the way of numbers. On the contrary, their right to regulate and adjust their rates is universally recognized."

Upon this question of the rule at common law, Story on Bailments, section 508, 8th Edition, states the rule to be that a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry freight on being paid a reasonable compensation; but the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis.

This is agreeable to the language used by CROMPTON, J., in Garten vs. B. & E. R. R. Co., 1 B. & S., 112:

"The charging another party too little is not charging you too much."

And all the authorities hold that

"In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company."

Ransome vs. Eastern Counties Ry., 1 C. B. (N. S.), 437.

In Baxendale vs. E. C. Ry. Co., 4 C. B. (N. S.), 78, it is said by BYLES, J.:

"I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge."

And in Great Western Railway Co. vs. Sutton, L. R., 4 H. L., 226, it is said by BLACKBURN, J.:

"At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for refusing; and, if the customer, in order to induce the carrier to perform his duty, paid, *under protest*, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable."

See to the same effect Thompson on Carriers, Sec. 297 *et seq.*, and note, Sec. 302; Smith's Leading Cases, Vol. 1, pp. 381-448; 62 N. Y., 171,-179; Schouler on Carriers, pp. 355, 356.

Certainly at common law the obligations of a common carrier were not as stringent in respect to making difference in rates to patrons as they are in the interstate commerce law. Justice BROWN very properly observes, in the party rate case above quoted from, that a rate may be entirely reasonable under section 1 of the Act, and yet it may be an unjust discrimination under the subsequent sections of that act. The subsequent sections apply stringent provisions to secure equality of rates, which did not obtain at common law. Under the principle of the party rate case, we insist that the dif-

ference between the charge of the Telegraph Company to the Call Publishing Company and the charge of the State Journal under the testimony disclosed in this regard was entirely proper, and if the Telegraph Company had been subject to the provisions of that act, or its action was to be tested by the stringent provisions of the different sections of that act, that no case under the interstate commerce act could have been made against it upon the facts disclosed in this record. If this is true, clearly there was no discrimination under any rule or principle of the common law.

In addition to the foregoing considerations respecting the absence of discrimination, and that the word rate furnishes no basis of comparison between different classes of service, it is to be observed that it was impossible to apportion any part of the $125 paid by the State Journal to the day rate, and another portion to the night rate. The $125 paid for both day and night rate was for an entire service as a unit, and, for the reasons which have already been given, there was such a difference in the conditions that the word rate furnished absolutely no test of the propriety of the charge for the services.

Moreover, it was insisted by the Telegraph Company upon the trial, and is now insisted in its behalf that a portion of the consideration to the Call Publishing Company for the $75 paid to the Telegraph Company was the exclusive privilege of receiving the Associated Press reports and publish them in its evening paper. It is true that a certain price for the privilege was paid to the Associated Press. But the memorandum of agreement between the Western Union Telegraph Company and the Northwestern Associated Press shows very clearly that these two par-

ties were closely inter-related in the matter of transmission of newspaper dispatches to points in this territory, the Associated Press very carefully stipulating not to interfere with the commercial news and market reports or quotations which the Telegraph Company was engaged in disseminating, the Telegraph Company on its part agreeing to transmit news only for the Northwestern Associated Press.

It further appears from the correspondence (Record, pp. 121, 122) that Calhoun, the proprietor of the "State Democrat," who originally obtained the franchise (Exhibit "A," p. 117) from the Associated Press, was informed by the Associated Press manager that, prior to any arrangement being made with him for the news, he must arrange with the Telegraph Company for the cost of transmission of the report and make an arrangement for that transmission, when they would then take the matter into consideration.

It further appears that when the rate was made, on the 6th of June, 1887, for the transmission of the Northwestern Association's 1,400-word report to Lincoln, before the service was begun there was required an arrangement, for the use of the report, with the Association, and the order for the service of the report filed with the Telegraph Company came not from Calhoun, the publisher of the "Democrat," but from the Association. This being so, we submit that the point made by the Telegraph Company, upon the trial of the cause in the Supreme Court and upon the motion for rehearing (Record, p. 132), that the use of the service of the Associated Press was a part of the consideration which the Call Publishing Company received for the $75 paid, was well taken. It was improper, in view of this fact, to attempt to compare

the $75 paid by the Call Company with the $125 paid by the Journal Company.

III.

The Supreme Court of Nebraska ought to have reversed the Judgment of the trial Court because of its refusal to charge as requested by the telegraph Company, and for errors in the charge given to the Jury.

If, however, we are wrong in the first and second propositions which we have urged to this court, still it was the duty of the Supreme Court of Nebraska to have reversed the judgment in this case in view of the failure of the court to give to the jury instructions asked by the defendant (Record, pp. 17, 18) and refused by the court. And, also, in view of the instructions which were asked by the plaintiff, and given by the court (Record, p. 16).

If it be true, as is held by the Supreme Court of Nebraska, in the opinion already quoted from, that,

"in the absence of national legislation, the principles of the common law or general jurisprudence of the State of the action are applicable and may be asserted and enforced,"

still we insist that, in applying the principles of the State law to interstate services, the Supreme Court of Nebraska must apply those common-law principles correctly, else the interstate service is subjected to a burden by the State which deprives the person rendering the interstate service of rights and

immunities under the common law, to which he is entitled under the Federal Constitution. In other words, the State Court must rightly interpret and apply the common law as applicable to such interstate services. We insist that, under the rules of the common law, the charge to the jury asked for in behalf of the defendant below, that, under the law and evidence in this case, there was no right of recovery, should have been given; and, also, the charge that there was a difference between the classes of service rendered the "Lincoln State Journal" and to the "Call Publishing Company," and that no verdict could be rendered upon any comparison of the respective services rendered to these companies. We also insist that the instruction requested by the plaintiff and given by the Court, that the payments made by the "Call Publishing Company" to the telegraph company could not be deemed voluntary payments, and that no protest was required, is not a correct exposition of the law upon that subject.

It should be noted that there is no charge in the petition in this case, and no attempt in the testimony to establish the fact that the rate paid by the "Call Publishing Company" was an unreasonable one for the services rendered. On the contrary, as we have already pointed out, the defendant offered testimony which stood uncontradicted at the close of the trial, that the sum paid by the "Call Publishing Company" was intrinsically a reasonable one. What the petition does charge is that there was a wrongful and unjust discrimination in favor of the "State Journal Company" and against the "Call Publishing Company," whereby an undue advantage accrued to the "State Journal Company," in that the rate per hundred words daily per month to the Journal was $1.50 and the rate per hun-

dred words daily per month to the Call Publishing Company was $5, and to the extent of the excess of $3.50,

"it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company" (Record, p. 6).

It is clear from the testimony that the services were not the same, like, and contemporaneous services, that they differed materially in the time of rendition, and character, cost and value of the services rendered, and that these facts justified a difference in rates. But even assuming for the purposes of this argument that there was a difference in rate for the same services, then the charge in the petition only amounts to an allegation that the telegraph company charged the Call Publishing Company a reasonable rate and, charged the Journal Company too little for its services; and the question is whether, that being so, an action lay at common law to recover back the difference between the higher and the lower rate under these circumstances. As we have already seen, according to the language of CROMPTON, J., in Garten vs. B. & C. R. R. Co., "charging another party too little is not charging you too much." The other authorities which are cited *(ante,* pp. 52, 53*)* from the English courts are to the same effect, that there may be a charge too low for one party, but that does not prove that the rate charged to a particular person is an unreasonable rate. The rate may still be reasonable as to him, that is reasonable compensation for the services rendered.

The Court of Appeals of New York, in Lough vs. Onterbridge (143 N. Y., 271), after a full consideration, held that

"while a common carrier is bound to convey and deliver goods for a reasonable compensation, and may not where the circumstances and conditions are the same unreasonably or unjustly discriminate in favor of one against another, it may make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions."

In this case a steamship company maintained a line of vessels between New York and Barbadoes and the Windward Islands. Its regular standard rate for freight prior to December, 1891, from New York to Barbadoes, was 50 cents per barrel, which was the unit of measurement, and the tariff of charges was adjusted for goods shipped in other forms and packages accordingly. In December, 1891, it reduced its regular rate from 50 to 40 cents per barrel. A tramp steamer began to take cargo at that time from New York to Barbadoes and made irregular trips. It was a competitor for a part of the business of the defendant's vessels. They thereupon adopted the plan of offering special reduced rates of 25 cents per barrel for freight to all merchants who would agree to ship exclusively by their line during the week that the tramp steamer was engaged in obtaining freight and taking on cargo; at other times the freight remained at 40 cents.

The action in the case was brought by a shipper who tendered freight while the tramp steamer was in New York and insisted on the right to the rate of 25 cents per barrel, but declined to stipulate to ship all his freight by this line of steamers. The question arose as to the duty of the defendant. It appeared from the facts of the case further that 40 cents was a reasonable rate; 25 cents was not profitable. Giving the opinion on the subject, O'BRIEN, J., says (p. 279):

" There can be no doubt that at common law a common carrier undertook generally and not as a casual occupation to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement and for all people indiscriminately, and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive profit for the services; and he has no right in any case, while engaged in this public employment, to exact from any one anything beyond what under the circumstances is reasonable and just (2 Kent's Com. [13th Ed.], 598; Story on Bailments, Secs. 495, 508; 2 Parsons on Cont., 175; Killmer vs. N. Y. C. & H. R. R. R. Co., 100 N. Y., 395; Root vs. L. I. R. R. Co., 114 *id.*, 300). It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary, the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity and character of the goods, and many other matters, must be considered. The carrier can afford to carry ten thousand tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and where the business is of great magnitude a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case the finding implies

that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. * * * If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries (Fitchburg R. R. Co. vs. Gage, 12 Gray, 393; Sargent vs. B. & L. R. Corp., 115 Mass., 422; Mogul S. S. Co. vs. McGregor, Gow & Co., L. R. [21 Q. B. Div.], 544; affd., 23 Q. B. Div., 598, and by H. L. [17 Appeal Cases], 25; Evershed vs. L. & N. W. Ry. Co., L. R. [3 Q. B. Div.], 135; Baxendale vs. E. Co. R. Co., 4 C. B. [N. S.], 78; Branley vs. S. E. R. Co., 12 *id.*, 74)."

To the same effect is the decision of WALLACE J., in Menacho vs. Ward (27 Fed. Rep., 529), his language being as follows:

"Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence, it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

This is the common law rule upon the subject. The uncontradictd testimony in this case on the part of the defendant was that the rate of $75 per month to the Call Publishing Company was reasonable, and

there being no allegation in the petition of the plaintiff and no testimony to the contrary of this in the case, the charge asked by the defendant and refused by the court that the plaintiff was not entitled to recover should have been given. The requests to charge that there was no unjust discrimination in favor of the "State Journal" and against the "Call Publishing Company" should also have been given.

The mere fact that there was a difference in rates wholly independent of the difference in the quality of the service, so long as the rates at which the dispatches were transmitted for the Call Publishing Company were reasonable, gave that company no cause of complaint, even although the telegraph company saw fit to render similar services to the State Journal for even less than cost. The discrimination could only be an unjust one upon proof that the rate to the Call Publishing Company was an excessive and unreasonable one. No such proof can be found in this record, and the submission to the jury to guess at what would be a reasonable rate on the part of the carrier was conferring upon the jury the prerogative of fixing rates for the telegraph company for sending press matter, based upon some theory or surmise that they might form from the difference between day and night rates for commercial and press messages, which were wholly different in character and kind.

Voluntary Payment.

In addition to this, the jury should have been instructed that, under the facts of this case, there could be no recovery from the telegraph company by the Call Publishing Company, because there was a continuous series of voluntary payments, without protest, at the rate named by the "Call Publishing Company." Being a voluntary payment there was no duress, and the rule at common law is that a payment of that kind cannot be recovered back. This rule was affirmed by this Court in its opinion in case of Railroad Co. vs. Commissioners, 98 U. S., 541.

WAITE., C. J., at page 543, delivering the opinion, approves the statement in Wabaunsee Co. vs. Walker (8 Kan., 431):

"Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

See, also, Dillon's Municipal Corporations (4th Ed.), Sections 945, 946, 947.

The rule upon the subject as applied to carriers is thus stated in "Hutchinson's Common Carriers," Section 447:

"*The Amount of Compensation for Carriage.* Further than that his charges shall be reasonable, the common law seems to have put no restriction upon the carrier in respect to his demand for compensation, and what is a reasonable charge can, of course, be fixed by no particular rule, but must be determined in every

case, as a question of fact, by the same rules which would apply to other cases of service performed, except that the extraordinary responsibility of the carrier for the safety of the goods must always in such cases be taken into consideration as an element of the service. Compensation for the carriage is, however, generally fixed by the agreement of the parties, or ascertained by the known accustomed rates of the particular business in which he is employed; and, consequently, but few controversies arise as to its amount between the carrier and his employer. If the owner who desires to send his goods should believe his charges to be unreasonable he should tender to the carrier, at the time he offers his goods, what he believes to be a reasonable amount for the service, and upon the carrier's refusal to accept them upon the proposed terms, the owner may bring an action against him for his refusal; or if the price for the carriage is not demanded in advance, the owner may demand the goods after the carriage, tendering what he believes to be a reasonable compensation, and upon the carrier's refusal to accept the tender and deliver the goods, he may sue him for them in trover or replevin; in which, however, he would fail if the issue as to reasonable compensation should be determined in favor of the carrier. Or the consignee or other party entitled to the goods may pay the charges exacted as a condition of their delivery, with an accompanying denial of the right of the carrier to exact it, and may, after thus obtaining his goods, bring his action and recover so much of the payment as has been illegally demanded and paid. Money paid under such circumstances beyond the amount to which the party demanding it is justly entitled, is paid under compulsion. And it is not necessary, to entitle himself to this remedy, that he should have tendered to the carrier the amount which he thought reasonable, or that he should have stated the amount to which, in his opinion, the carrier was entitled, with an offer to pay it. It is enough that he complained of the charge as unreasonable and paid it under protest."

In Killmer vs. N. Y. Central & H. R. R. R. Co. (100 N. Y., 395), there was a suit brought against the railroad company by a milk shipper who had been shipping for

a number of years, and who paid a tariff rate of 60 cents for every 40 gallons of milk carried for a portion of the time, and for another portion of the time covered by the suit, a rate of 45 cents. There was never any agreement between the plaintiff and the railway company as to the rate of freight to be charged or paid beyond what might be implied from a general tariff rate fixed by the railway company known to the shipper and the payment by the shipper for the service at that rate. It was admitted on the trial that the shipper paid this freight daily at the tariff rate without making any objection. The shipments covered a period of thirteen years, and during that period there was no negotiation between the parties as to the rate of freight to be charged, and no complaint or remonstrance on the part of the shipper that the charge was excessive. The complaint based the right to recover, on the ground of extortion, and the extortion consisted in the alleged fact that the railway company had fixed an excessive rate which the shipper paid without objection. Upon this question of the right to recover back under these circumstances, ANDREWS, J., says (p. 402):

"But the common law duty does not preclude special contracts between railroad corporations and shippers regulating the freight charge, and where, as in this case, freight has been carried for a long course of years at the schedule price, the shipper making no objection and no inquiry as to the reasonableness of the charge when it was his interest to object if the charge was unreasonable, he must, we think, be deemed to have assented to the charge as reasonable, and to have voluntarily waived any objection thereto. At least the receipt by the company of the freight at the tariff rate, under such circumstances, has no element of extortion. The company is doubtless better informed than the shipper as to what would be a compensatory

or reasonable charge, but many of the facts which enter into the formation of a judgment on the question are accessible to the shipper, and it would not be in accordance with general principles of justice that he should be permitted to forbear all means of ascertaining the truth, and after the lapse of years for the first time open a question which he did not, at the time of the transaction, regard of sufficient importance to engage his attention.

"We are of opinion that this action cannot be maintained. The express admission that the payments sought to be recovered, were made without objection, renders it unnecessary to consider whether the small part of the claim which accrued after the service of the notice of August 20, 1879, stands in any different position from the rest. All concur."

Keener on *quasi* contracts, page 438, states the rule as to the recovery back of money from a common carrier in this wise:

"On the same principle it is held that a carrier who refuses to receive goods tendered to him unless a sum of money is paid to which he is not entitled, must refund to the plaintiff the over-payment made under such circumstances."

This author refers no case of a right to recover from a carrier where the money has been voluntarily paid, but only where the carrier has either refused to receive goods unless the money was paid, or where the carrier has refused to deliver goods only upon the condition of receiving a payment to which the carrier is not entitled (See *id.*, p. 428).

The court gave an instruction requested by the plaintiff to which defendant excepted (Record, p. 16), that although the plaintiff paid year by year for these services under a contract, yet if he discovered that the amount paid by the State Journal was considerably less, upon such discovery the payment would cease to

be a voluntary payment, and no protest would be required on his part, and that he could bring an action to recover it back. This, we submit, is not the law, and for this erroneous instruction the judgment should have been reversed by the Supreme Court of Nebraska.

Respectfully submitted,

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JOHN F. DILLON,

Of Counsel.